

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

COMMONWEALTH SCIENTIFIC AND )  
INDUSTRIAL RESEARCH )  
ORGANISATION, INC. ) DOCKET NO. 6:06cv324

-vs-

)  
) Tyler, Texas  
BUFFALO TECHNOLOGY, INC., ) April 17, 2009  
ET AL ) 9:00 a.m.

MICROSOFT CORPORATION, ET AL )  
) DOCKET NO. 6:06cv549

-vs-

)  
)  
COMMONWEALTH SCIENTIFIC AND )  
INDUSTRIAL RESEARCH )  
ORGANISATION, INC. )

COMMONWEALTH SCIENTIFIC AND )  
INDUSTRIAL RESEARCH )  
ORGANISATION, INC. ) DOCKET NO. 6:06cv550

-vs-

)  
)  
TOSHIBA AMERICA, ET AL )

INTEL CORPORATION, ET AL )  
) DOCKET NO. 6:06cv551

-vs-

)  
)  
COMMONWEALTH SCIENTIFIC AND )  
INDUSTRIAL RESEARCH )  
ORGANISATION, INC. )

TRANSCRIPT OF JURY & BENCH TRIAL  
BEFORE THE HONORABLE LEONARD DAVIS,  
UNITED STATES DISTRICT JUDGE, AND A JURY

A P P E A R A N C E S

(SIGN-IN SHEETS DOCKETED IN EACH CASE)

COURT REPORTERS: MS. KIMBERLY JULIAN  
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PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY,  
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

1 P R O C E E D I N G S

2 (The jury entered the courtroom.)

3 THE COURT: Good morning, Ladies and  
4 Gentlemen of the Jury. Well, I have some good news and  
5 some bad news.

6 Would you like the good news first or the  
7 bad news?

8 A JUROR: Bad news.

9 THE COURT: The bad news.

10 All right. The bad news is, you drove  
11 over here this morning and didn't have to, because I'm  
12 going to -- some matters have come up that I've got to  
13 deal with during the day today that if you stay, you'd  
14 be in the jury room most of the time. And I did that to  
15 you too much yesterday, and since we're going to stop at  
16 1:30 anyway.

17 The good news is that you're going to get  
18 to go home.

19 A JUROR: Woohoo.

20 THE COURT: I know everybody is  
21 disappointed and anxiously awaiting to hear more about  
22 di-bit interleavers, but we're going to let you have a  
23 nice long weekend. We will start back on Monday morning  
24 at nine o'clock, is the plan.

25 Now, I would encourage you to check with

1 the 1-800 number the night before, just to be sure that  
2 that hasn't been moved up or back or sideways or  
3 something like that. Because as I'm sure you realize by  
4 now, you can't anticipate everything that's happening in  
5 a case. And if we could, it would be a lot smoother.  
6 And I apologize again for having you drive in this  
7 morning. But it wasn't until this morning that I made  
8 the decision that we just weren't going to get in enough  
9 time with you today to, I think, make it worth your  
10 while to be here.

11 Please -- it's going to be a three-day  
12 weekend. Remember my instructions. Do not discuss the  
13 case among yourselves, not with your family members or  
14 friends. Don't do any independent research. You've got  
15 very important duties as jurors in this case, and you  
16 need to follow the instructions that have been given and  
17 come back on Monday, and we'll -- I anticipate that  
18 we'll start on Monday, and we should finish the evidence  
19 probably on Tuesday and should get the case to you  
20 possibly on Tuesday, but more probably on Wednesday of  
21 next week.

22 Thank you for attendance today, and you  
23 are excused to the jury room.

24 (The jury left the courtroom.)

25 THE COURT: Okay. Please be seated.

1 All right. I understand from visiting  
2 with the parties, would you like to announce the  
3 settlements that have been accomplished?

4 MR. VAN NEST: I'll let Mr. Furniss do  
5 that.

6 THE COURT: Mr. Furniss.

7 MR. FURNISS: Settlements have been  
8 reached between CSIRO and Intel and Dell. And I believe  
9 that a tentative agreement has been reached with Buffalo  
10 as well, but that MOU is in the process of being  
11 drafted.

12 THE COURT: "MOU" being memorandum of  
13 understanding?

14 MR. FURNISS: Yes, Your Honor.

15 THE COURT: Mr. Van Nest, do you confirm  
16 that representation?

17 MR. VAN NEST: I understood there was a  
18 partial settlement with Toshiba.

19 MR. FURNISS: The settlement with Intel  
20 removes part of the case against Toshiba.

21 THE COURT: But Toshiba is still in the  
22 case to the extent -- not indemnified by Dell -- I mean  
23 by Intel?

24 MR. VAN NEST: No, Your Honor. They're  
25 resolved from the case with respect to any Intel parts

1 they purchased. They're still in the case based on any  
2 parts they purchased from people other than Intel.

3 THE COURT: And who is representing  
4 Toshiba?

5 Mr. Wilcox.

6 MR. WILCOX: Yes, Your Honor.

7 THE COURT: Do you agree with that?

8 MR. WILCOX: Well, our lead counsel is  
9 across the street, but that's my understanding, Your  
10 Honor.

11 THE COURT: All right.

12 MR. VAN NEST: Your Honor, we're now  
13 appearing here on behalf of Nintendo of America.

14 THE COURT: All right. Due to the  
15 settlement of Dell and Intel?

16 MR. VAN NEST: Yes, sir.

17 THE COURT: All right. What -- what  
18 about Buffalo? Is there someone here from Buffalo?

19 MR. MIKE JONES: Your Honor, I represent  
20 Buffalo. And unfortunately nobody else is here but me  
21 from Buffalo. I do not doubt what Mr. Furniss said, but  
22 I have not been informed of that yet. And I'm certain  
23 over the weekend, I will be.

24 MR. BUFE: Your Honor, if I could also  
25 speak. John Bufe for -- I'm also co-counsel for

1 Buffalo. I do see that I have an email indicating that  
2 there is an agreement with Buffalo, and they're papering  
3 the agreement, but there is an agreement.

4 THE COURT: All right. We have Dell,  
5 Intel and Buffalo settled, right?

6 Correct?

7 MR. VAN NEST: Correct, Your Honor.

8 THE COURT: Do the parties agree if  
9 there's any disagreement regarding the meaning of the  
10 memorandums of understanding that are being executed,  
11 you'll submit those to the Court to resolve it?

12 MR. VAN NEST: On behalf of Intel, yes,  
13 Your Honor.

14 THE COURT: What about Dell?

15 MR. JACKSON: Your Honor, I think the  
16 memorandum of understanding has been -- we've agreed to  
17 submit any disputes to Judge Faulkner as an arbitrator.

18 THE COURT: All right. That's the  
19 best course, but if not Judge Faulkner, will you accept  
20 me?

21 MR. JACKSON: I was about to say, not to  
22 deprive you of the opportunity.

23 THE COURT: Mr. Wilcox?

24 MR. WILCOX: Yes, Your Honor.

25 THE COURT: Mr. Furniss?

1 MR. FURNISS: Yes, Your Honor.

2 THE COURT: All right. Very well. Now,  
3 as I've discussed with counsel in chambers, we're  
4 standing down for the day. I've sent the jury home.  
5 We'll be back Monday morning at nine o'clock.

6 Y'all have a mediation, I believe, with  
7 Judge Faulkner beginning at 11:00 today. I would  
8 encourage all of the parties to make their best efforts  
9 to find a common ground and business solution to  
10 whatever issues remain between whatever parties.

11 In the event that doesn't happen, we'll  
12 start back on Monday, we'll finish the evidence on  
13 Tuesday, and we'll hopefully get it to the jury on  
14 Tuesday, but it may be on Wednesday.

15 I would appreciate it if lead counsel  
16 would notify me or notify Judge Faulkner -- that would  
17 probably be better -- and I would like a report by, say,  
18 three o'clock Sunday afternoon as to what parties are  
19 left in the case, because I do not want to bring this  
20 jury -- I want to put a message on the phone by 5:00  
21 o'clock Sunday where they won't have to come back if  
22 everybody settles. But if not, we will start back on  
23 Monday morning.

24 So y'all -- every party is instructed to  
25 get with Judge Faulkner, and he's going to let me know



1 by three -- and ask him, if you would, when you see him  
2 to let me know by three o'clock. He has my cell phone.  
3 And let me know by three o'clock on Sunday if there are  
4 any parties remaining, who they are.

5 MR. VAN NEST: We'll do that, Your Honor.

6 MR. FURNISS: Yes, Your Honor.

7 THE COURT: All right. Very good.

8 Anything further the Court can help you  
9 with today?

10 MR. VAN NEST: I don't believe so.

11 THE COURT: All right. I commend the  
12 parties for the progress they've made. And keep up the  
13 good work this weekend and see if we can't get this  
14 thing behind everybody.

15 Thank you. Be adjourned.

16 (Recess.)

17 THE COURT: Please be seated.

18 All right. I understand you have a RAND  
19 witness; is that correct?

20 MR. VASQUEZ: Yes, Your Honor. We have  
21 Gerald Rosenthal and he has not been sworn.

22 THE COURT: Mr. Rosenthal, if you would  
23 be stand.

24 (The witness was sworn.)

25 THE COURT: You may proceed.

1 GERALD ROSENTHAL,  
2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. VASQUEZ

5 Q Could you please state your full name for the  
6 record.

7 A My name is Gerald Rosenthal.

8 Q And where do you reside?

9 A I reside in Westchester County, New York.

10 Q Can you give us your educational background?

11 A I received a bachelors and master's degrees in  
12 electrical engineering from New York University and a  
13 law degree from Pace University.

14 Q A law degree?

15 A Yes.

16 Q And can you tell us a little bit about your  
17 work history, what did you start out in and went to work  
18 for your first company?

19 A I started out as an engineer, biomedical  
20 engineer, and I worked for them, then I worked for the  
21 Institute of Health in dialysis research. I joined IBM  
22 in 1968 as a systems engineer, became a marketing rep,  
23 eventually marketing manager, and I moved into the  
24 licensing operation in 1984.

25 Q At some point did you go to law school?

1           A     I did, I went to law school in the evening  
2     while I was working for IBM from 1980 through 1984.

3           Q     And at some point did you get involved in the  
4     licensing?

5           A     I joined the licensing operation in 1984.

6           Q     What did you do in the licensing --

7           A     I started out as a licensing rep and doing  
8     licensing negotiations for IBM in the patent licensing  
9     area. I eventually moved out to Tokyo again for all of  
10    our licensing in the Asia Pacific area from 1988 through  
11    '91. I came back as director of licensing in '91. Then  
12    in 1999 I was their vice-president of intellectual  
13    property and licensing.

14          Q     Tell us about the work you did in Japan.

15          A     I was responsible for all of IBM's licensing  
16    activities in Japan, Korea, Taiwan, and the entire Asian  
17    area.

18          Q     At some point did you go back to the IBM  
19    headquarters?

20          A     I did. In 1999 -- I take that back. In 1991  
21    I came back to New York.

22          Q     How did IBM's licensing change from the time  
23    you joined through your tenure as director of licensing?

24          A     I'm not sure how it changed. Our income grew  
25    quite a bit over those years.

1 Q Okay. What was the general level of licensing  
2 expressed in dollars between '98 -- or beginning in  
3 1998?

4 A When I joined in 1998 before, we were probably  
5 bringing in five to ten-million dollars a year. By the  
6 time I retired from IBM in 2005 our income was over a  
7 billion-and-a-half dollars a year.

8 Q Was it all from one patent?

9 A Oh, golly no, it was for IBM's entire patent  
10 portfolio.

11 Q And how many patents are we talking about for  
12 the entire IBM patent portfolio?

13 A Thousands and thousands of patents. We were  
14 the number one issuer of patents for the last twelve  
15 years for the US patent industry.

16 Q At some point I think you said you became the  
17 vice-president of licensing and intellectual property?

18 A Yes, that's correct.

19 Q And how was that organized?

20 A When I became vice-president, I was  
21 responsible for all of IBM's IP attorneys, as well as  
22 all of our licensing people, as well as those people  
23 responsible for standards.

24 Q And when you say "those people responsible for  
25 standards," what do you mean?

1           A     I had a team of people at the corporate  
2     headquarters who had overall responsibility for  
3     licensing for the corporation -- for standards for the  
4     corporation, but we also had responsibility over the  
5     hundreds of people who were the various standards  
6     organizations to coordinate with them what their  
7     responsibilities were when they met within the standards  
8     organizations.

9           Q     So in your time at IBM, how many patent  
10    licenses would you estimate you were involved in  
11    negotiating?

12          A     Oh, over a thousand probably.

13          Q     When was the first time you became actively  
14    involved with standards organizations in your licensing  
15    work at IBM?

16          A     When I came back in 1991 as director of  
17    licensing, I was responsible for reviewing and  
18    recommending to the vice-president what positions we  
19    should take with regard to patents and standards  
20    organizations.

21          Q     Can you explain the IBM standards group, how  
22    it was organized?

23          A     Yeah. We had a central standards group that  
24    was responsible for putting out the policies and  
25    practices within IBM and educate -- we ran education

1 sessions for all of the people who were in the  
2 development divisions who attended the standards  
3 meetings so that they would know what their  
4 responsibilities were and what their roles were.

5 Q Okay. What type of employees at IBM carried  
6 out the participation work on the ground, so to speak?

7 A They were mostly development people who were  
8 intimately involved with the technologies for the  
9 standards that they were involved with.

10 Q Okay. And then you had -- the standards group  
11 was essentially how they organized the data and their  
12 responsibilities?

13 A Correct.

14 Q Did this group have any responsibility for  
15 approving IBM's participation in setting new standards  
16 of the organization?

17 A Absolutely. When we joined a standards  
18 organization, we had to understand what the policies and  
19 practices were and what IBM's responsibilities would be  
20 to that standards organization, so our department  
21 reviewed that and made a determination of whether or not  
22 it met within our guidelines.

23 Q Are you familiar with the term LOA?

24 A I am.

25 Q What does it mean?

1           A     Letter of assurance.

2           Q     When IBM was in the position of considering  
3 whether to give a letter of assurance, did your group  
4 have responsibility for that consideration?

5           A     As I said, from the time I became  
6 vice-president in '99, the standards organization  
7 reported to me, so again I had direct responsibility.

8                     From '91 through '99 when we met to make that  
9 determination, I looked at the -- at the patents that  
10 were involved and made a recommendation to the  
11 vice-president on whether or not we should issue an LOA.

12          Q     What training was involved that you  
13 supervised?

14          A     We trained our people to be sure that they  
15 understood that they were not to make any commitments to  
16 a standards organization without approval from corporate  
17 headquarters, and also that once they were involved in a  
18 standards group, that they were incurring an obligation  
19 on IBM's part to disclose any patents that we might have  
20 that would be relevant to the standard.

21          Q     That is make the disclosures for IBM to those  
22 organizations?

23          A     Correct.

24          Q     So what was your role with the standards group  
25 during the time as director of licensing?

1           A     At that time since I was responsible for all  
2     IBM's licensing activities, I would make a  
3     recommendation once we understood what was involved,  
4     what we might get involved, what commitments we might  
5     have to make, I would recommend to the vice-president  
6     whether or not we should make those commitments, and he  
7     always accepted my recommendations.

8           Q     And how many RAND licensing agreements did you  
9     negotiate as director of licensing?

10          A     As I said, I didn't negotiate them personally  
11     when I was director of licensing, but I was responsible  
12     for reviewing probably dozens during that time period.

13          Q     So you had to be briefed to make the final  
14     approval?

15          A     I did. I had to make final recommendations.

16          Q     How did your role in the standards group  
17     change -- strike that.

18                 What was your responsibility with respect to  
19     the standards setting organizations themselves, is it  
20     any different than what you described?

21          A     No, it is not.

22          Q     How did that group change over time? You said  
23     the revenue changed, the size of the company changed.

24          A     Well, as technology changed and the internet  
25     grew and new standards organizations came into being



1 with lots of different rules and policies and what they  
2 were doing, it was natural that my group had to grow as  
3 the areas of software in the internet became much more  
4 important to us.

5 Q Did the emergence of standards groups grow  
6 during this period of time?

7 A Absolutely, both formal and informal standards  
8 groups.

9 Q Did the concept of interoperability, as it  
10 relates to standards setting organizations, come more  
11 into play over time?

12 A Absolutely. And the internet is probably the  
13 best example of that about the requirements for  
14 interoperability.

15 Q What's the relationship between a standard  
16 setting organization and the need for interoperability?

17 A Well, if technology is going to be adopted and  
18 widely used, then interoperability becomes an important  
19 requirement.

20 And in that light, setting the standards so  
21 that all manufacturers of products related to that  
22 technology can operate. And then as you look at the  
23 telephone telecommunications technology, we wouldn't  
24 have what we have today, and especially with regard to  
25 the internet, if we didn't have interoperability in

1 standards.

2 Q As the emergence of standard setting  
3 organizations proliferated, was your department required  
4 to hire some more people?

5 A Certainly supervise more people. I was always  
6 -- at the corporate we always -- we kept the people  
7 down, but within the product and development divisions  
8 it certainly grew.

9 Q Did the time committed from your group  
10 increase?

11 A Certainly. As time went on, the issue of  
12 standards interoperability became more and more  
13 important. It took up more and more of my time.

14 Q Which standards group do you recall being  
15 involved in?

16 A Oh, I was involved in the IEEE, I was involved  
17 in ISO, I was involved in ITF, I was involved in ANSI, I  
18 was involved in probably dozens of them. I can't  
19 recollect all of them.

20 Q Okay. Now, the licensing that we've been  
21 discussing, was that limited to for-profit companies?

22 A No, certainly not. We did license agreements  
23 with universities, government agencies, as well as  
24 for-profit companies.

25 Q Did you have an opportunity to observe how

1 IBM's licensing practices compared to other companies in  
2 the same standard setting organizations?

3 A IBM, we did a lot of benchmarking with other  
4 companies in our area and other areas, people who want  
5 to understand how we ran our business, and so we  
6 regularly ran benchmarking meetings to talk about how  
7 each company ran its business and what we could learn  
8 from each other.

9 Q What do you mean by "benchmarking"?

10 A Well, we'd get together for a day, talk about  
11 our operations and the policies and practices and how we  
12 ran our business and how it was organized, and other  
13 companies would do the same, so that we could basically  
14 share the public information that would enable us to run  
15 our businesses better.

16 Q Thank you. Do you have other non-IBM patent  
17 licensing experience?

18 A I do. When I retired from IBM in 2005, I was  
19 asked to head up a company called the invention network,  
20 which was a consortium of five and then six companies  
21 that -- my responsibility was to buy patents on the open  
22 market that would enable us to build a portfolio where  
23 that we would be able to use to defend Linux. We  
24 licensed those patents royalty free to any comer who  
25 would agree not to use its patents against Linux.

1 Q What is Linux?

2 A Linux is an operating system, much like  
3 Microsoft's operating system, but it's a free operating  
4 system that anybody can use.

5 Q What is the need to defend Linux and create  
6 this --

7 A Well, there were threats against Linux by  
8 various patentholders that they might want to sue Linux  
9 assume. And since Linux was sort of this amorphous  
10 being that didn't own patents on its own, we basically  
11 became the de facto patent portfolio for Linux.

12 Q What was the goal of that activity?

13 A Purely defensive. We were only building the  
14 portfolio to use it -- thank goodness we did not have to  
15 use it during my tenure -- to bring suit against anybody  
16 who sued Linux for patent infringement.

17 Q Did it have a broader goal of making  
18 technology affordable?

19 A Well, it made it free, because basically we  
20 licensed our patents royalty free to anybody who would  
21 agree not to use their own patents against Linux.

22 Q Thank you. Now, any other experience with  
23 patent licensing and any you're doing currently?

24 A I'm doing some consulting right now.

25 Q Okay. Are you currently the head of the

1 patent pool for Blue Ray?

2 A Well, the patent pool hasn't been formed yet,  
3 but I've been announced if and when we form the patent  
4 pool, they've asked me to be the CEO of it.

5 Q So there's the genesis, foundational  
6 activities are going on?

7 A It's still in the foundational stage. Very  
8 well put.

9 Q What is Blue Ray?

10 A Blue Ray is a technology that people who are  
11 looking at movies, I guess, today that's moved up from  
12 the normal DVD movies to the next level of movies, and  
13 it's a technology that enhances the movie experience.

14 Q Okay. So basically Blue Ray is to DVD what  
15 DVD was to VHS tape?

16 A It's the next level, takes DVD to the next  
17 level.

18 Q Do you review any cases or legal treatises in  
19 preparation for your expert testimony?

20 A I'm sorry. Can you repeat -- did I review --

21 Q Any legal treatises or cases.

22 A I read -- I read a number of documents in  
23 preparation.

24 Q Are those referenced in your expert report?

25 A They are.

1           Q     What are standard setting organizations and  
2     what's their purpose?

3           A     The purpose of standard setting organizations,  
4     as you said earlier, is to establish standards so that  
5     people can build products that are interoperable with  
6     one another, that enables commerce to move forward. And  
7     we talked about the telephone, telecommunications, the  
8     internet. Those are all examples where progress would  
9     not have been made without standards being set that  
10    people could operate against.

11          Q     And what the benefit to be public of SSOs or  
12    standard settings organizations?

13          A     Well, the benefit is that now you have  
14    competition out there that people can build products  
15    that compete with one another, and that brings the price  
16    of those products down and makes the consumer, first of  
17    all, much more accessible to the technology, and  
18    secondly, the cost of that technology is much less to  
19    the consumer because of the competition.

20          Q     Does it enhance consumer choice as well?

21          A     Well, that's what I said. It makes more  
22    choices available, brings more competition.

23          Q     Thank you. What type of technology do SSOs  
24    adopt for their standards? In other words, are they  
25    always focused on the highest performance as their goal?

1           A     No. It's usually a trade-off between cost and  
2     performance. What you want to do is make the product  
3     accessible to the consumer at a low cost, so you're  
4     always looking at cost versus performance in determining  
5     what technologies to adopt.

6           Q     Is obtaining a RAND commitment from  
7     patentholders important to picking the right technology  
8     alternative?

9           A     It's certainly one of the important factors,  
10    because that goes directly to what the ultimate cost of  
11    the product would be to the consumer.

12          Q     Thank you. What is patent holdup?

13          A     Patent holdup means --

14                   MR. FURNISS: Objection to this question,  
15    Your Honor. There is no defined terms "patent hold" up.  
16    It's a pejorative term as well.

17                   THE COURT: Overruled.

18          Q     (By Mr. Vasquez) You may answer.

19          A     Patent holdup is when a patentholder, in my  
20    opinion, has a patent and that it potentially reads on a  
21    standard, and they're trying to get what I would call  
22    exorbitant rates of -- of income for their patent to  
23    make the -- the cost to the consumer and everybody else  
24    much more expensive.

25          Q     Is that an understood term that heard

1 throughout your career involving standard setting  
2 organizations and in your benchmarking meetings with  
3 other companies?

4 A It's certainly a term that was used.

5 Q And how does patent holdup occur?

6 A Patent holdup occurs in two ways. One, when a  
7 company does not make its patent available to a  
8 standards organization, waits for the technology to  
9 become widely used and widely accepted and then goes  
10 around trying to collect royalties for its patent. The  
11 second is when they are involved in the organization,  
12 but nevertheless charge unreasonable royalties.

13 Q In the second situation, are you assuming that  
14 they submitted an LOA and then they break it?

15 A They could have either submitted an LOA or  
16 just been involved in discussions.

17 Q Okay. How does an SSO deal with the problem  
18 that you described with a patent holdup?

19 A Well, it tries to avoid it by getting  
20 companies who are involved to sign LOAs when it's aware  
21 that it may have a patent that reads on the standard --

22 Q Okay.

23 A -- or the proposed standard anyway.

24 Q Thank you. I'd like to direct your attention  
25 to Exhibit 412, which will come up on screen. It's the



1 IEEE's standard patent policy. Have you read that  
2 before?

3 A I have.

4 Q What is the IEEE's patent policy?

5 A That it -- in terms of what you're talking  
6 about here, in terms of letters of assurance, it seeks  
7 letters of assurance for companies who are involved in  
8 the standards negotiations and discussions, that they  
9 will make their patents available at RAND rates.

10 Q Are there basically two components, disclosure  
11 and the RAND letter?

12 A That's correct.

13 Q Is that consistent with the other standards  
14 organizations that you've been involved in and you  
15 testified about?

16 A It is. Some of the standards organization  
17 I've involved with have even gone further, which demand  
18 that you make your patents available royalty free.

19 Q So this is not something that just affects the  
20 IEEE, it effects all of those organizations that you  
21 talked about?

22 A All of the ones that I've been involved with,  
23 yes.

24 Q All right. So the basic duty of disclosure,  
25 how does that work for a member of the organization?

1           A     They're asked if they have a patent they  
2     believe reads on the standard, to submit a letter of  
3     assurance, which sets forth their RAND obligations.

4           Q     What if the members know about third-party  
5     patentholders that may have a patent which bears on the  
6     standard?

7           A     They would ask them for a letter of assurance.

8           Q     So are the members encouraged to disclose the  
9     third parties they know about?

10          A     Only those they know about.

11          Q     Right. Once a patent is identified as  
12     potentially bearing on a particular standard, that's  
13     when the LOA goes out?

14          A     That's currently the request for the LOA, yes.

15          Q     What is the patentholder basically being  
16     requested to do once they receive a request for an LOA?

17          A     Either provide a RAND license royalty free,  
18     RAND license under reasonable and nondiscriminatory  
19     rates, or say that they will not participate.

20          Q     Do you know if the IEEE analyzes whether a  
21     disclosed patent, one that comes in response to a  
22     request, is either valid or whether the standard or  
23     product which practices the standard would infringe?

24          A     The IEEE, nor any other standards organization  
25     to my knowledge, does any investigations.

1 Q At this time, I direct your attention to  
2 Exhibit 874, please. That's up on your screen.

3 It's a December 4, 1998, letter signed by  
4 Dennis N. Cooper of CSIRO. Do you have that in front of  
5 you, sir?

6 A I do.

7 Q Have you seen this?

8 A I have.

9 Q Does CSIRO state in this letter that its  
10 patent is essential to the 802.11a standards?

11 A They say in the event the standards adopted  
12 and cannot be practiced without using the patent, that  
13 they will make it available at RAND rates.

14 Q Okay. So basically they say it may be  
15 essential, correct?

16 A They do.

17 Q In your experience, when IBM provided the IEEE  
18 or other SSOs with an LOA, had IBM made a determination  
19 that its patents were essential to the proposed  
20 standard?

21 A No. Generally if we had patents within the  
22 technology area that may or may not have been  
23 applicable, we would submit a letter.

24 Q Okay. Is that industry practice, based upon  
25 your benchmarking experience?

1           A     Yeah. Most of the companies that I talk with  
2           generally did not do any prior investigations, other  
3           than to say we have patents within the general  
4           technology area, and if we do, we'll make them  
5           available.

6           Q     Sort of the abundance of caution standard?

7           A     That's a good way to put it.

8           Q     What's your experience in terms of how long an  
9           LOA remains in effect after the letter is sent?

10          A     In my experience, it's -- it's irrevocable.  
11          You've made it, and it's committed to all versions and  
12          amendments to the standard whenever they're issued.

13          Q     Okay. Is that the policy today?

14          A     I don't believe IBM has changed its practice  
15          since I retired.

16          Q     Has that always been the policy?

17          A     It was always the policy while I was at IBM.

18          Q     What is your experience in terms of whether an  
19          LOA carries forward to subsequent amendments to a  
20          standard?

21          A     I think I've already answered that. The  
22          answer is in our opinion it does, because basically what  
23          you're talking about is when standards are amended,  
24          generally they carry the earlier technology forward and  
25          make enhancements to it. So if you did not provide that

1 assurance for later versions, basically you would be  
2 killing the standard in later versions.

3 Q Is that the policy today at the IEEE?

4 A It's my understanding that it is.

5 Q Has this always been the policy for the IEEE?

6 A My understanding that it was.

7 Q What is the impact of that policy on CSIRO's  
8 RAND commitment that it made in 874?

9 A I believe CSIRO, when they made that  
10 commitment, made it to all versions of 802.11.

11 Q You're referring to 802.11g?

12 A Whatever versions there are that go forward  
13 that continue to use the same technology that's  
14 enhanced.

15 Q And you're familiar that 802.11n is under  
16 consideration, but hasn't been finalized?

17 A I'm aware of that.

18 Q And would the LOA apply to that also?

19 A Assuming the technology stays the same and  
20 it's just an enhancement to the earlier versions of that  
21 technology, I believe that commitment is still binding.

22 Q In your experience, why is this an important  
23 policy?

24 A Well, if it wasn't, what you'd then experience  
25 is later versions, you end up with patent holdup because

1       somebody's technology is part of the earlier version,  
2       it's now carried forward to the later versions, and all  
3       of a sudden, we say, well, he we're not going to do it,  
4       and now you're in a holdup position because the  
5       technology is in that and you're saying you're no longer  
6       committed.

7           Q     Okay. Thank you. Is that applicable to the  
8       CSIRO situation with this letter that was initially  
9       issued in 1998 at the time of the 802.11a?

10          A     I believe it is.

11          Q     Would you explain how the holdup problem --

12          A     Well, the holdup problem is, as you mentioned,  
13       "g" and then the proposed "n" just carry forward the "a"  
14       technology.

15                So, if in fact, somebody were allowed not  
16       to -- to withdraw their commitment at this point in  
17       time, basically they could say, okay, now we're going to  
18       go charge whatever royalty rates we want because we're  
19       no longer committed. But the technology is now built  
20       into product, going all the way back from "a" right  
21       through "g" right through "n", and that would create a  
22       situation that's untenable.

23          Q     Are you aware that CSIRO contends that it does  
24       doesn't have the RAND commitment for 802.11g or "n"  
25       because it didn't send in a new letter?

1           A     I'm aware that it has not sent a letter. I  
2     don't know that it has not committed to "g". I  
3     understand that they have offered a license to "g".

4           Q     If CSIRO took the position that because it  
5     didn't send a letter to the committee on "g" or "n", it  
6     doesn't owe an LOA RAND commitment for those standards,  
7     would they be right or wrong?

8           A     They're wrong.

9           Q     Why is that?

10          A     Because, in fact, as I stated earlier, when  
11     you make the commitment, you makes it to all later  
12     versions. Otherwise, you could create -- nobody would  
13     put patents in or the standard would become meaningless,  
14     and that would be untenable.

15          Q     Should CSIRO have told the committee that it  
16     didn't intend to offer RAND terms on "g" and "n"?

17          A     It doesn't matter whether it told it or not,  
18     in my opinion.

19          Q     Okay. What is royalty stacking?

20          A     Royalty stacking is when -- when a company A  
21     charges a royalty and then B charges another royalty and  
22     C charges a third royalty, and before you know it,  
23     you've built a royalty that's probably more than the  
24     cost of building the product.

25          Q     Does that have a result on the standard?

1           A     Well, sure it has a result, because then it  
2     makes the price of the standard so expensive that nobody  
3     is going to adopt the standard and nobody is going to  
4     build products to that standard.

5           Q     Okay. Is that what RAND commitments are  
6     supposed to address?

7           A     That's exactly what RAND commitments are  
8     supposed to address.

9           Q     Now, in your deposition, you stated that you  
10    believe there's a theoretical royalty stacking  
11    problem -- you use that term -- because there are so  
12    many patents disclosed to the 802.11 standards. Can you  
13    explain.

14          A     Well, there's -- there's probably hundreds of  
15    patents there. And if everybody were able to charge  
16    a -- a significant royalty, it would well exceed the  
17    cost of the product.

18          Q     Okay. At the time of your deposition, you had  
19    no specific knowledge about the status of whether those  
20    LOA writers actually amend the royalties, correct?

21          A     I would be looking at the companies that I  
22    looked at, my guess is very few of them charge.

23          Q     Okay. Have you talked to -- the original  
24    order of witnesses was going to be Mr. Olson. But did  
25    you get a chance to talk to Mr. Olson from Netgear about



1 Netgear's situation?

2 A I -- I understood and read some documents and  
3 understand that Netgear now has been sued by five or six  
4 companies for patent infringement for the standard. And  
5 that's just clearly an example that I talked about of  
6 royalty stacking.

7 Q Okay. Now, you're not suggesting that it's  
8 wrong for the companies who send in an LOA citing a RAND  
9 commitment to collect royalties on their patents, are  
10 you?

11 A I am not.

12 Q Okay. What is your experience regarding what  
13 constitutes a reasonable loyalty under a RAND commitment  
14 in an LOA to an SSO?

15 A Well, based on my experience, as I said, it's  
16 either nothing or a very low rate.

17 Q When you say nothing, is there a term for the  
18 nothing?

19 A It's -- it's called RAND zero, I believe.

20 Q Or RAND Z?

21 A RAND Z. But some companies do charge minimal  
22 rates. At IBM, generally our rates were somewhere in  
23 the range of five to twenty thousand. Basically the  
24 cost of preparing and sending out a contract.

25 Q Okay. Why would any patentholder agree to a

1 RAND commitment with a low reasonable royalty?

2 A Because they want the technology adopting the  
3 standard. If the technology is not part of the  
4 standard, it may have zero value. If the technology  
5 becomes part of the standard and the standard becomes  
6 widely used, then they're collecting a very small amount  
7 on each device. Cumulatively, they could be collecting  
8 a very large sum of money.

9 Q So the markets are larger for standardized  
10 products?

11 A The markets generally are much larger for  
12 standardized products.

13 Q And so it's acceptable to take a lower  
14 royalty?

15 A That is generally why. You want your  
16 technology in the standard, so the standard gets widely  
17 adopted. So many devices are built, and so they collect  
18 a significant royalty.

19 Q Now, what about for a research institution  
20 like CSIRO that doesn't recoup its research cost through  
21 the product sales. Is the RAND commitment that's  
22 reasonable and, in your opinion, low, fair to them?

23 A Well, again, yes, because if -- if, in fact,  
24 their technology was not in the standard, what they made  
25 inventions for would have no value. So by being part of

1 the standard, by the standard becoming widely adopted  
2 with hopefully millions and millions of units sold, they  
3 would still be collecting significant royalties, even  
4 though the -- the royalty rate on each box was very low.

5 Q Were you here for Mr. Kawaguchi's testimony  
6 here yesterday?

7 A I was.

8 Q Did you hear him mention that this is a  
9 billion unit market?

10 A I heard him say it was a billion unit market.  
11 So I think he even said a penny a box in a billion unit  
12 market is a lost of money.

13 Q Thank you. In your experience, when is a  
14 reasonable royalty rate determined?

15 A It's determined at the time the standard's  
16 adopted, before the standard's adopted so, that the  
17 standards may be -- organization understands what the  
18 ultimate costs would be.

19 Q Okay. Is there something crucial about that  
20 time period from the perspective of the committee?

21 A Well, sure. After the fact, when the standard  
22 becomes adopted and widely used, people then can  
23 determine what they want to charge, now we end up with a  
24 patent holdup situation.

25 Q What's the most common type of RAND royalty

1 that you've seen?

2 A Well, as I said in my experience, it's either  
3 been zero or very low fixed payment royalties, sometimes  
4 very low percentage, but mostly fixed payment.

5 Q What other type of RAND royalty rates have you  
6 seen? Any in this case?

7 A In this case, I heard Mr. Kawaguchi's  
8 testimony where, I guess, Mr. Farrara (phonetics) came  
9 forward with a rate of ten cents, and it was rejected as  
10 being too high. Lucent came forward with some rates.  
11 There was much discussion there, and that turned out to  
12 be just for implementation of technology and, therefore,  
13 not necessary to be used, and, of course, then there's  
14 the Radiata example where they're charging five percent  
15 down to a half percent.

16 Q Did you hear the testimony about the RAC WEP  
17 license?

18 A I did. That was a fixed rate, as I recollect,  
19 and as the volumes grew, the rates went up slightly.  
20 And I think the maximum rate for building millions and  
21 millions of units was just \$125,000.

22 Q Okay. Was the -- the evidence consistent with  
23 your experience and your opinion that a reasonable  
24 RAND -- not a RAND Z royalty -- is low?

25 A Yes. I would think that would be reasonable.

1 Q Okay. Directing your attention at this time  
2 to Exhibit 254.

3 And if you look at the front page, this is  
4 Radiata agreement with CSIRO.

5 A Yeah. I see that.

6 Q You've looked at this?

7 A I have.

8 Q Directing your attention to Page 126 the  
9 document, which is the royalty rate schedule.

10 A I see that.

11 Q Looking at this rate table on the last page,  
12 are these rates consistent with what you observed as a  
13 reasonable royalty under the RAND?

14 A They're probably a little higher than what  
15 I've generally seen, but I would say that -- that the  
16 high end of the acceptable range, especially when you  
17 get to the high volume numbers.

18 Q So in this particular license for 3 million  
19 and over on the derivative chip, it's one-half of one  
20 percent of the chip rate. Do you see that?

21 A I do.

22 Q You heard Mr. Kawaguchi's testimony yesterday,  
23 correct?

24 A I did.

25 Q He testified the target that was being looked

1 at by the committee that adopted 802.11a was  
2 approximately a five to ten dollar chipset. Do you  
3 recall that?

4 A I do.

5 Q Would this one-half of one percent in volumes  
6 of three million be applied to a five to ten dollar chip  
7 price?

8 A I believe it would.

9 Q And if that were the circumstance, if that  
10 were the royalty rate, is that within RAND?

11 A I believe that would be at the high end of the  
12 RAND range.

13 Q Okay. Now, I'd like you to take a look at  
14 Exhibit 246, please.

15 Now, this is where CSIRO extended the Radiata  
16 licensing rate to Cisco after Cisco acquired Radiata.  
17 Did you look at this?

18 A I did.

19 Q What rate did Cisco get under this extension?

20 A I believe they got the same rates that Radiata  
21 had in their original agreement. It was passed on to  
22 them.

23 Q So they would get half of the percent of chip  
24 price and units --

25 A Of 3 million and above, that's correct.

1 Q Did you get to review any Cisco royalty  
2 reports that show the sums paid by Cisco to CSIRO under  
3 that extension?

4 A I believe I saw a report from a year or two  
5 ago where they were paying 11 cents a chip.

6 Q And was that at the one-percent level where  
7 you were between a million and three million or was that  
8 at the half-percent level?

9 A I think that was still at the one percent  
10 level.

11 Q Can you infer what the rate would be at a half  
12 percent --

13 A It would be five cents.

14 Q Five cents?

15 A Yeah.

16 Q Five cents for selling a Cisco box and  
17 retaining a Radiata chip, correct?

18 A That's correct.

19 Q Was this agreement extended further beyond  
20 Cisco?

21 A I believe it was extended to some of Cisco's  
22 suppliers like Marvell and a few others. I don't  
23 remember all the other names.

24 Q I direct your attention at this time to  
25 Exhibit 184. This is a document of September 2, 2003,

1 and it appears to be an extension. Is this what you  
2 reviewed?

3 A It is.

4 Q And is this where CSIRO extended the licensing  
5 rate that you just testified about to cover chips made  
6 by Marvell and sold to additional companies besides  
7 Cisco?

8 A It is.

9 Q So what additional companies had the benefit  
10 of this rate?

11 A I believe all of Cisco's suppliers.

12 Q Okay. So all of -- well, are they  
13 specifically enumerated here in the license?

14 A Yeah, they mention Marvell, they mention  
15 Cirrus Logic and Sharp and SkyPilot Networks.

16 Q So which companies are getting the benefit of  
17 the five-cents-per-box rate by virtue of these  
18 extensions?

19 A I believe all of them are.

20 Q Now, have you seen any evidence in the case,  
21 either from the plaintiff or the defendant, that does  
22 not support your opinion on what constitutes a RAND  
23 royalty?

24 A Yeah, I saw a couple of the plaintiff's expert  
25 witness reports that talked about higher royalties.



1           Q     To the extent those reports talked about \$4  
2     being a reasonable rate, do you agree or disagree with  
3     that?

4           A     I totally disagree with that. For a 5 to \$10  
5     piece of equipment to charge 4 to \$5 would make the  
6     technology untenable.

7           Q     Let's switch topics to the "D" in RAND,  
8     discriminatory. In your experience at IBM, in what  
9     situations did you offer different or distinct RAND  
10    royalty rates to different and distinct licensees?

11          A     We never offered different rates. Everybody  
12    received the same rates.

13          Q     And why is that?

14          A     Because we wanted to be sure that it was  
15    nondiscriminatory and that the marketplace could fairly  
16    compete using our patents on an equal footing.

17          Q     What does that mean for this situation, this  
18    case where you see the evidence of what happened with  
19    the rate being given to Cisco and its suppliers versus  
20    the \$4 rate?

21          A     It says to me that everybody needs to get the  
22    same rate, the Cisco rate, in order for it to be  
23    nondiscriminatory.

24          Q     Thank you.

25                Why is the no discrimination limitation

1 important?

2 A Because otherwise you could end up with one  
3 company having an unfair advantage in the marketplace,  
4 being able to price its products lower than others, and  
5 basically creating a monopoly situation for themselves.

6 Q Is the situation particularly enhanced when  
7 you have a market leader like Cisco getting the  
8 advantage of the low rate?

9 A Absolutely, it just gives the market leader a  
10 further advantage on price that makes competition not  
11 viable.

12 Q Would the allowance of these discriminatory  
13 scenarios have any long-term impact on standards  
14 organizations and the participation by the members?

15 A Yeah, eventually it would create a situation  
16 where nobody would be joining standard organizations and  
17 submitting their patents to that because you have no way  
18 to determine how to compete in the marketplace.

19 Q Do you believe that the five-cent rate that  
20 you testified about, the half percent on unit sells of  
21 3 million or more in the Radiata and Cisco, is that  
22 within the RAND for this case?

23 A It's probably at the high end from my  
24 experience.

25 Q Would CSIRO still earn money in a billion-unit

1 market using five cents?

2 A A billion units is a lot of units and at that  
3 rate they would probably be earning fifty million to a  
4 hundred-million dollars, so that's a lots of money, in  
5 my opinion.

6 Q Thank you very much, sir.

7 MR. VASQUEZ: No further questions. Pass  
8 the witness.

9 THE COURT: All right. How long do you  
10 expect on cross?

11 MR. FURNISS: About a half hour.

12 THE COURT: We're going to take about a  
13 ten-minute recess.

14 (Recess.)

15 THE COURT: Please be seated.

16 Before you start, Mr. Furniss.

17 Mr. Vasquez, you mentioned several exhibits. Were you  
18 going to offer those?

19 MR. VASQUEZ: Your Honor, yes, we've  
20 stipulated to those. Is that correct, counsel?

21 MR. FURNISS: Correct.

22 THE COURT: What are they?

23 MR. VASQUEZ: Sure.

24 UNIDENTIFIED COUNSEL: Exhibit 412, 874,  
25 254, 246, and 184.

1 THE COURT: Any objection?

2 MR. FURNISS: No, Your Honor.

3 THE COURT: Admitted.

4 With regard to exhibits, too, both sides  
5 Monday morning I want to -- I want both sides to stand  
6 up and offer whatever exhibits they're going to offer  
7 and I'll admit them or not.

8 MR. MIKE JONES: Yes, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. FURNISS

11 Q Good morning, Mr. Rosenthal.

12 A Good morning.

13 Q We've met before. I'm Dan Furniss. I  
14 represent CSIRO?

15 A We have met before.

16 Q Now, I would like to ask you, first of all,  
17 about the -- your testimony regarding the Radiata  
18 agreement. Do you recall that?

19 A I do.

20 Q And let's use the same number, Defendants'  
21 Exhibit 254. And are you familiar with this agreement?

22 A Yes, I've seen it.

23 Q And you're familiar with its terms?

24 A I've read them.

25 Q Yes. Isn't it true that this only provided in

1 the license limited to the specific designs that Radiata  
2 provided to Cisco?

3 A I believe it provided the circuitry necessary  
4 to what's now performed in the standard.

5 Q Let's look, if we can, to the schedule.

6 If we can blow up the definition of standard  
7 chip. Can you read that?

8 A I have.

9 Q And it says, "Standard chip means a chip  
10 developed by the licensee based on the current design of  
11 the 16-point FFT with 9 bit internal arithmetic,  
12 differential QPSK modulator or demodulator and a rate  
13 one-half convolutional code with constraint length of 5  
14 and either with or without a Parrot Mac processor."

15 A I do.

16 Q The next says, "A derivative chip means a chip  
17 developed by the licensee with parameters other than  
18 those contained in the standard chip."

19 A I see that.

20 Q Now, were you here yesterday when Mr. Rossi  
21 testified on behalf of Cisco?

22 A I was not.

23 Q Are you aware that there was testimony that  
24 Cisco was no longer using -- that the Radiata design was  
25 a failure and they were buying their chips from Atheros?

1           A     I did not hear that.

2           Q     Would it change your opinion if that in fact  
3     were the case?

4           A     No.

5           Q     Why not?

6           A     Because the fact that they're talking about  
7     these chips and the chips that are related and CSIRO  
8     made a commitment to the standards organization.

9           Q     Well, I'm talking about this license. You've  
10    relied on this license to conclude that CSIRO's demands  
11    are unreasonable?

12          A     But they didn't pass this license and allowed  
13    both Cisco and eventually Marvell and others to use this  
14    license to make chips and then Cisco in fact has been  
15    paying royalties based on this license which CSIRO, I  
16    understand, has accepted.

17          Q     Are you aware that Cisco is only paying on a  
18    small percentage of its production and not on its  
19    Linksys subsidiary?

20          A     I'm aware that Cisco is paying royalties, I'm  
21    not aware of exactly whatever all the products that  
22    they're paying. But they're paying the royalties they  
23    believe are necessary under these -- under this  
24    agreement.

25          Q     Are you aware that Cisco has never paid

1 royalties until last August when it checked for six  
2 years on any of its Linksys subsidiary products?

3 A I'm not sure when they bought Linksys and when  
4 it was necessary, but they are paying royalties and  
5 those royalties are being accepted.

6 Q Assume that in fact the Linksys subsidiary of  
7 Cisco has not paid royalties nor have those royalties  
8 been accepted, would that change your opinion?

9 A It depends what those products are supposed to  
10 cover and what those royalties would be for.

11 Q So you haven't read any of the Cisco  
12 witnesses' testimony on this issue; is that right?

13 A I have not read the Cisco witnesses'  
14 testimony.

15 Q And you've only looked at the royalty report?

16 A I've looked at the royalty report.

17 Q Did you compare the number of units on the  
18 royalty report with Linksys' sales?

19 A I have not.

20 Q If in fact Cisco is only paying on a small  
21 percentage of its commercial products and not for  
22 Linksys subsidiaries, wouldn't that indicate that Cisco  
23 does not believe it's covered by this license agreement?

24 A No, it would indicate that the Cisco doesn't  
25 believe that the patent covers what Linksys is building

1 and therefore there's no need for them to pay royalties.

2 Q Now, if you look at page 4 of the technology  
3 license agreement. If you can zero in on the 4.1 at the  
4 top there. Let me back up.

5 You understand that this agreement was not  
6 simply a patent license, that it was a technology  
7 transfer?

8 A I do.

9 Q And that pursuant to that CSIRO agreement with  
10 Radiata was designs and tests and a lot of data that was  
11 used by Radiata to work on the chip?

12 A I do.

13 Q And if you look at paragraph 4.1, do you see  
14 there that it requires Radiata to, in subdivision 4.1b,  
15 use its best efforts to exploit the technology?

16 A I do.

17 Q Do you recognize that that would be a value to  
18 CSIRO in addition to any patent workings it might  
19 obtain?

20 A It would just mean that they've asked them to  
21 make the best efforts to build a chip themselves.

22 Q If you go to the next 4.1c, do you see there  
23 that it also requires Radiata to meet minimum  
24 performance obligations?

25 A I do.



1 Q And were you aware of what that meant?

2 A Whatever those obligations are that they  
3 discussed.

4 Q Are you aware that they had to ship 10,000  
5 units by December 31 of 2001?

6 A I believe I remember that was in the  
7 agreement.

8 Q And that would be beneficial value to CSIRO as  
9 well, would it not?

10 A It would be a value.

11 Q And so in addition to the fact that it was a  
12 technology transfer license, there was an obligation to  
13 use best efforts to exploit the technology and that it  
14 had to meet minimum performance obligations, this  
15 agreement requires more than a patent license would  
16 require in a situation where a patent applies to the  
17 other products; isn't that right?

18 A It might. I'm not sure there's any relevance  
19 to that.

20 Q Well, in terms of establishing what price  
21 CSIRO was willing to obtain at this point, isn't it  
22 relevant to what they thought the fair value was at this  
23 point in time?

24 A So that might indicate that in fact the rates  
25 that Radiata was paying for the patent piece were even

1 less than are listed.

2 Q Don't you have to value -- you have to value  
3 the entire package to establish its value; isn't that  
4 true?

5 A You have to look at all the elements.

6 Q And if you were getting things in addition to  
7 royalties, that would increase the value to CSIRO, would  
8 it not?

9 A It might. I'm not sure that it would or it  
10 wouldn't.

11 Q Well, in this situation, you've said you're  
12 experienced in this field, isn't it true that if there  
13 were these additional obligations to actually take the  
14 technology to market, it would be more valuable than a  
15 bare patent license?

16 A Not necessarily.

17 Q Now, if you would, I've put in front of you a  
18 book there. The black book has a copy of your  
19 deposition, in case you need it. And let me ask you  
20 about some of your testimony in your deposition.

21 First of all, were you able to find any court  
22 case that considered or defined the meaning of RAND?

23 A No. In fact, you asked me that in my  
24 deposition, and I agree that I have not.

25 Q So there's no legal guidance in the record as

1 to what a RAND commitment would mean?

2 A No, it's more custom and practice.

3 Q And there's no written guidelines by the IEEE  
4 either; isn't that true?

5 A Again, it's custom and practice.

6 Q Well, is the custom and practice the same? In  
7 fact, you testified in your deposition that you knew how  
8 IBM and some other companies treated it, but you didn't  
9 know how all companies treated it.

10 A I said based on my understanding and over 20  
11 years experience working with both IBM and other  
12 companies, that the custom and practice was as I said in  
13 my deposition.

14 Q And you said it -- I'll quote from page 34, at  
15 line 13.

16 A I want to be sure I'm on the same page as you.  
17 34, line 13?

18 Q Yes. And the question was, quote: "So is it  
19 your belief that there was some body of industry  
20 practice that was, in effect, incorporated into a RAND  
21 commitment?"

22 A I'm not sure I'm on the same page 34 as you  
23 are.

24 Q We have it on the screen. Perhaps that's  
25 easier.

1 A Oh.

2 Q It says, "So is it your belief that there was  
3 some body in the industry practice that was, in effect,  
4 incorporated in the RAND commitment?"

5 And your answer was, quote: "I don't know.  
6 No, I wouldn't use the word practice."

7 Do you see that?

8 A I do. I said each company would make its own  
9 judgments and then that's the judgments that became  
10 custom.

11 Q And it was different from company to company,  
12 wasn't it?

13 A It could be. As I told you, I spoke from my  
14 experience, my experience in dealing with IBM and other  
15 companies in the industry who aren't as familiar.

16 Q Like you weren't familiar with an industry  
17 practice as such, were you?

18 A There was not any specific industry practice,  
19 more what individual companies did, and in toto most of  
20 those companies that I dealt with did what we did.

21 Q So how would a third party such as CSIRO  
22 determine what your custom and practice was of all these  
23 companies, call them all up?

24 A They would certainly call up some of them, I  
25 would think, before they sent in such a letter. I would

1 think they would consult with their lawyers before you  
2 write a letter and find out what you're committing to  
3 and what other people are doing so that you have some  
4 familiarity with what's going to be expected of you.

5 Q Now, the letter that was sent by the IEEE by  
6 Mr. Hayes included pre-forms; isn't that right?

7 A Do I have that in front of me?

8 Q Well, let's look at the CSIRO letter. And  
9 that was Defendants' Exhibit 874.

10 Can you see that on the screen?

11 A I do.

12 Q Second paragraph.

13 Now, do you recognize that as the same form  
14 that was suggested by the IEEE to CSIRO?

15 A I do.

16 Q And it says -- it uses the term "reasonable"  
17 and "nondiscriminatory"; isn't that right?

18 A It does.

19 Q It doesn't say very, very low or zero, does  
20 it?

21 A It says reasonable and nondiscriminatory, and  
22 the question was what do I consider reasonable and  
23 nondiscriminatory.

24 Q Well, do you have any explanation for why the  
25 letter from the IEEE didn't say what you say is the

1 industry practice?

2 A Because that's the way they wrote their  
3 letters as reasonable and nondiscriminatory. They were  
4 not looking for somebody to say that it was either going  
5 to be zero or a low rate, they just said reasonable and  
6 nondiscriminatory. But everybody who was on the  
7 committee as Mr. Kawaguchi testified yesterday had a  
8 clear understanding of what that meant as they evaluated  
9 patents to put into the standard.

10 Q Well, Mr. Hayes who wrote CSIRO initially was  
11 the chairman of the committee; isn't that right?

12 A That's correct.

13 Q And if there wasn't an understanding, a  
14 practice that reasonable meant very, very low or zero,  
15 Mr. Hayes would have known that, right?

16 A It was -- what the form letter said, that  
17 everybody who practiced it understood what reasonable  
18 and nondiscriminatory was.

19 Q Well, why wasn't that disclosed to CSIRO?

20 A I have no idea.

21 Q In fact, the IEEE has never taken the position  
22 that reasonable means very, very low or zero, has it?

23 A Well, if you look at Mr. Kawaguchi's testimony  
24 yesterday, clearly it has, as it meets in committees to  
25 determine what patents to include in the standard.

1 Q But it's never written that down anywhere?

2 A That's fine.

3 Q Isn't it true that in 2008 the IEEE  
4 specifically stated that it took no position on the  
5 meaning of reasonable?

6 A It took no formal position, but the individual  
7 committee members in determining that there was going to  
8 be a standard that it was going to allow in there, it  
9 was clear in his testimony yesterday that it did do that  
10 on a regular basis in evaluating one technology over  
11 another.

12 Q Those were in the cases where the proponent  
13 identified a patent in the context of a proposal?

14 A It was identified in the letter submitted,  
15 yes.

16 Q In this case there was no evidence that CSIRO  
17 attempted to get the committee to adopt its particular  
18 patented technology; isn't that true?

19 A No, but it did submit an LOA.

20 Q Right, that said reasonable and  
21 nondiscriminatory?

22 A That said reasonable and nondiscriminatory.

23 Q Now, in your report you made reference to a  
24 number of learned treatises in this area, did you not?

25 A I did.

1           Q     For example, the treatise by Professor Lemley.  
2     Do you recall that?

3           A     I do.

4           Q     And in that article -- I misspoke, it wasn't a  
5     treatise.

6                     In that article, Lemley said there is no  
7     attempted definition of reasonable; isn't that right?

8           A     If you go further down, a couple lines down in  
9     that thing, he clearly says that at the end of the day  
10    this will be determined by the judge based on custom and  
11    practice, as I recollect.

12          Q     Didn't he say by the Court?

13          A     I said by the judge and the Court.

14                    THE COURT: Mr. Furniss, let me ask if  
15    you can clarify or the witness can. You've made  
16    reference in Defendants' Exhibit 887, which is the IEEE  
17    letter to CSIRO, that there were some form letters  
18    attached; is that correct?

19                    MR. FURNISS: Yes, Your Honor.

20                    THE COURT: And the letter that CSIRO  
21    wrote back, which is Plaintiff's Exhibit 86, is that  
22    wording -- I mean is that identical? In other words,  
23    who drafted the language of the letter that CSIRO sent?  
24    Is that word-for-word copied from the IEEE's option  
25    letter or was it paraphrased?



1 MR. FURNISS: We will present evidence on  
2 this if the Court needs it, but perhaps we can establish  
3 this by stipulation. Other than putting in the patent  
4 name and the name of CSIRO, it's word-for-word from the  
5 IEEE.

6 THE COURT: Do defendants agree with  
7 that?

8 MR. VASQUEZ: Yes.

9 THE COURT: So it was drafted -- the  
10 draftsman of the letter was the IEEE, then, in essence;  
11 is that correct?

12 MR. VASQUEZ: I wouldn't say the  
13 draftsman of the letter was IEEE, but they used the  
14 language that was suggested.

15 THE COURT: The exact language, right?

16 MR. VASQUEZ: Yes.

17 THE COURT: Okay.

18 Q (By Mr. Furniss) Now, Mr. Rosenthal, you used  
19 the term "patent holdup." Do you recall that?

20 A I do.

21 Q Isn't the term "patent holdup" designed for  
22 situations -- or refers to situations where the  
23 patentholder fails to identify the patent prior to the  
24 ratification of the standard?

25 A Not always.

1 Q Well, in this particular case, the committee  
2 was aware of CSIRO's patent before -- well before it  
3 ratified the standard; isn't that right?

4 A Certainly before, I don't know how well  
5 before.

6 Q This letter dated in -- the letter that is --  
7 been looking at, which is Defendants' Exhibit 874, is  
8 dated on December 4th, 1998. Do you recall that?

9 A It says so in the letter.

10 Q Okay. And isn't it true that the standard was  
11 ratified not till the following summer?

12 A The following summer.

13 Q So the committee, including its chairman, was  
14 aware of the CSIRO patent well before the standard was  
15 ratified; isn't that true?

16 A That's correct.

17 Q And there was no effort made of any kind to  
18 contact CSIRO and ask them what royalty rate they might  
19 want to charge for that patent; isn't that right?

20 A That's correct. My guess is because they  
21 believe that CSIRO understood what RAND meant in terms  
22 of -- in the context of what the committee was doing.

23 Q Well, if someone weren't on the committee and  
24 participating in the committee, how would they know  
25 that?

1           A     Because they -- you assume that as CSIRO is an  
2     organization, it's part of the Australian government,  
3     that they would have done their due diligence before  
4     they submitted such a letter to find out what they were  
5     committing to.

6           Q     The only way you could do that due diligence  
7     would be to call up the committee members; isn't that  
8     right?

9           A     Call up people who are involved in the  
10    standards organization and understood what those people  
11    believed the RAND term meant. And I would believe in  
12    due diligence, that's a responsibility they had.

13          Q     Isn't it true that the RAND committee members,  
14    of the 802.11 committee members, were prohibited from  
15    collectively discussing price?

16          A     Collectively discussing price. But they  
17    certainly were able to discuss relative costs -- what it  
18    ultimately costs to build such a product, including what  
19    the royalties might be.

20          Q     Well, when you're talking about a royalty for  
21    intellectual property, is there any distinction at all  
22    between cost and price?

23          A     Well, price is the ultimate price that the  
24    product's going to sell for. Costs are the various  
25    elements that would go into a cost, such as

1 manufacturing costs and sales costs as well as patent  
2 costs.

3 Q But in terms of IP cost, the cost and the  
4 price would be exactly the same; isn't that true?

5 A The cost is the cost that the IP would cost,  
6 and clearly as Mr. Kawaguchi testified yesterday, they  
7 did discuss that, because they discussed Mr. Farrara's  
8 proposed cost as well as others. As well as RSA's costs  
9 when they submitted part of their proposal.

10 Q If you would look at Exhibit Number 2794.

11 Have you seen this document before, Mr.  
12 Rosenthal?

13 MR. VASQUEZ: Your Honor, I would object  
14 to this document -- and we put them on notice. If I  
15 could address the Court?

16 THE COURT: All right.

17 MR. VASQUEZ: This is not a document  
18 authored by the witness. It appears to be an internet  
19 posting. It wasn't produced by --

20 THE COURT: An internet what?

21 MR. VASQUEZ: An internet posting, the  
22 equivalent of someone writing on the wall, except they  
23 do it on the internet.

24 The purported author, if you read this,  
25 is an individual who is now deceased named Jeff Fromm.

1 There has been no deposition of Mr. Fromm. HP is not in  
2 this case. There's really no basis to utilize this as a  
3 piece of evidence in this case. It shouldn't be  
4 admitted.

5 THE COURT: Who was Mr. Fromm?

6 MR. FURNISS: He was IP counsel for  
7 Hewlett-Packard, Your Honor. This is an IEEE-sponsored  
8 website that -- and we're not offering it for the truth.  
9 We're offering it for the fact that it appears on the  
10 IEEE website in terms of defining what the term "RAND"  
11 means.

12 THE COURT: All right. The objection's  
13 overruled.

14 MR. FURNISS: If we can focus in on the  
15 first paragraph.

16 Q (By Mr. Furniss) Now, are you aware that the  
17 IEEE hosts a discussion site on the issue of RAND?

18 A You brought that up during my deposition.

19 Q And did you go look at it?

20 A I did not.

21 Q Why not?

22 A It's just a discussion chat amongst people  
23 discussing things that -- it's hard to tell whether the  
24 people even who say they're submitting it are the people  
25 putting it on.

1 I mean, when you have stuff on the internet,  
2 goodness knows what could be there and who put it and  
3 who is authoring it, and so I don't put much relevance  
4 in it.

5 Q This is an IEEE website that you can --

6 A But it doesn't prohibit anybody from  
7 submitting notes on it, and they just put things on.  
8 They're not -- they're not edited. There's nothing done  
9 with them, so I don't put much value in it at all.

10 Q Well, if it said, as it does, that RAND is a  
11 term without meaning, you would disagree with that,  
12 wouldn't you?

13 A I would disagree with that. But as I said,  
14 these are just people discussing things. It to me has  
15 no relevance.

16 Q And if there were many other posts to the same  
17 effect, you'd take the same view of that?

18 A Absolutely. Things that are posted on the  
19 internet in chat rooms and stuff like that just could be  
20 who knows what specious documents are there.

21 THE COURT: Was Mr. Fromm a member of the  
22 IEEE?

23 MR. FURNISS: Yes, he was, Your Honor. I  
24 believe he was.

25 THE COURT: The witness agree with that?

1 THE WITNESS: I have no idea, your Honor,  
2 whether he was or he wasn't or that he even posted this  
3 himself.

4 Q (By Mr. Furniss) As Mr. Gilchrist reminds me,  
5 this is a website of what's called PatCom. Have you  
6 heard of the PatCom of IEEE?

7 A I have not.

8 Q Let me represent to you that this is the  
9 patent committee of the IEEE and that's what this  
10 website is.

11 A But, again, anybody could submit things on it,  
12 and it's hard to tell whether the people submitting it  
13 and what they're saying and who they are and what the  
14 relevance, if any, is. These are just people discussing  
15 things. As we all know, unfortunately, too much junk  
16 gets on the internet, people discussing things that are  
17 harmful to others and who knows where they came from.

18 Q Well, if you look at the second page of this  
19 document, you see it's listed as Jeffrey Fromm, Vice  
20 President, Deputy General Counsel and Director of  
21 Intellectual Property, Hewlett-Packard Company. Do you  
22 see that?

23 A I see that. But, again, there's no  
24 corroboration that he did that or that he did do it or  
25 who he was or what his role was. I know a lot of people

1 at Hewlett-Packard. I did not know Mr. Fromm.

2 Q If we could call up Plaintiff's Exhibit 2069,  
3 please.

4 MR. VASQUEZ: Your Honor, just for a  
5 moment. I made an error. When you asked whether or not  
6 the language in the CSIRO written letter was the same as  
7 the form. We've compared it and that statement was in  
8 error and they're not the same. I urge Your Honor to  
9 compare them.

10 THE COURT: Would you bring up the form  
11 that was -- the form that was sent from the IEEE to  
12 CSIRO.

13 MR. FURNISS: Pull up Plaintiff's  
14 Exhibit 3387.

15 THE WITNESS: I'm sorry?

16 MR. FURNISS: We attempted to get a  
17 stipulation.

18 MR. VASQUEZ: We can take it up after the  
19 witness, Your Honor.

20 THE COURT: All right.

21 MR. FURNISS: Zoom in on the content of  
22 letter. This is Plaintiff's Exhibit 3387.

23 MR. VASQUEZ: Thank you.

24 Q (By Mr. Furniss) Do you see that on the  
25 screen?



1           And isn't it true that the only things that  
2           are contained on this letter where it says -- the form  
3           letter says, "In response to your letter of date," the  
4           term "20 October" has been added. Is that right?

5           THE COURT: Who is this letter from and  
6           to?

7           MR. FURNISS: This is a letter -- this is  
8           one of the form letters that was included with  
9           Mr. Hayes' letter to CSIRO in October of 1998. And  
10          it's --

11          THE COURT: Why is it addressed to  
12          Lucent?

13          MR. FURNISS: Mr. Hayes was the chairman  
14          of the IEEE 802.11 committee.

15          THE COURT: So this is one of the actual  
16          form letters that was submitted with the IEEE letter,  
17          Exhibit Number 887?

18          MR. FURNISS: Yes, Your Honor.

19          THE COURT: Okay. But the marks -- the  
20          handwritten marks were not on it; is that direct?

21          MR. FURNISS: No. They filled in the  
22          blanks on this letter.

23          THE COURT: Who did? Who is "they"?

24          MR. FURNISS: CSIRO did, Your Honor.

25          THE COURT: Okay.

1 MR. VASQUEZ: Your Honor, with this  
2 clarification -- we were handed Exhibit 2665 to make a  
3 comparison. This is the comparison, the appropriate  
4 one. So we would agree that this is their --

5 MR. FURNISS: Pardon me?

6 MR. VASQUEZ: That 3387 is the template  
7 that seems to match the CSIRO letter.

8 THE COURT: That matches the --

9 MR. VASQUEZ: The CSIRO letter that was  
10 sent in.

11 THE COURT: Sent by the IEEE?

12 MR. VASQUEZ: Yes, as distinct from 2665.

13 THE COURT: The one on the screen now is  
14 a match, absent the handwriting.

15 MR. VASQUEZ: Yes, sir.

16 THE COURT: All right.

17 MR. FURNISS: So that's established now?

18 MR. VASQUEZ: Yes.

19 Q (By Mr. Furniss) Now, Mr. Rosenthal, you said  
20 that the -- the parties had to reply on the courts to  
21 establish a reasonable royalty?

22 A That's what was -- you had referenced the  
23 Lemley article, and I said that Lemley at the bottom of  
24 his article, beyond where you were quoting, said that.

25 Q And do you have any reason to believe that a

1 jury cannot decide what a reasonable royalty is?

2 A In terms -- once they understand the testimony  
3 talking about how an SSO views RAND, in the context of  
4 an SSO, I would assume they can make that determination.

5 Q Isn't there an established test under the law  
6 for establishing what a reasonable royalty is, the  
7 Georgia-Pacific test?

8 A The Georgia-Pacific test is a general test for  
9 determining RAND. But in this case, we're talking about  
10 RAND in the context of SSOs and commitments made for the  
11 SSOs. So that's just another factor that needs to be  
12 considered.

13 Q And, in fact, defendants' experts in this case  
14 have considered that and have opined on that matter,  
15 have they not?

16 A I assume so.

17 Q So if the jury is unable to consider that,  
18 then is there any problem with a jury deciding what a  
19 reasonable royalty is?

20 A If the jury is able to consider it. I don't  
21 believe the jury was here when Mr. Kawaguchi testified  
22 yesterday.

23 Q But in their -- this is -- there's a damage  
24 trial scheduled for later, are you aware of that?

25 A I am.

1 Q And the damages are not at issue here.

2 A I understand.

3 Q So if, in fact, there is a damage trial, is  
4 there any reason why a jury cannot apply the  
5 Georgia-Pacific test, consider the SSO, and make a  
6 reasonable decision?

7 A I would assume that's the case.

8 Q So is it your view that CSIRO has given up its  
9 rights to a reasonable royalty under the patent statute  
10 because it's given a reasonable and nondiscriminatory  
11 letter to the IEEE?

12 A It's given up its rights in the sense that it  
13 made another commitment to the SSO, the IEEE, that  
14 further limits those RAND rights.

15 Q Isn't it true that the language of the IEEE  
16 letter and the language of the patent statute both talk  
17 about a reasonable royalty?

18 A That's correct. But then as I mentioned in  
19 the -- when they're determining what is a reasonable  
20 royalty before the technology's adopted into the  
21 standard, then they consider what the -- the relative  
22 costs might be, and as Mr. Kawaguchi testified  
23 yesterday, those cost clearly were an element in making  
24 that determination.

25 Q Now, are you aware that the draft 11n

1 standard, that the defendants have agreed that those  
2 products also infringe the CSIRO patent?

3 A There is no standard yet, so it's hard to  
4 determine what would be in the standard and whether or  
5 not it will be infringed.

6 Q Well, isn't it true that parties are already  
7 selling "n" products?

8 A They're selling products based on the proposed  
9 standard. It's not yet a standard.

10 Q But those products are interoperable with each  
11 other, are they not?

12 A In the sense of what was in "a" is now in "n",  
13 lifted up, because what happens is they've amended it  
14 and they've made sure that the prior technologies are in  
15 there so that they're backward compatible.

16 Q And the members of the IEEE are -- strike  
17 that.

18 The companies that are now selling draft "n"  
19 products were aware of CSIRO's royalty requests well  
20 prior to selling -- designing and selling those  
21 products; isn't that --

22 A Because of the backward compatible necessity,  
23 that was in the proposed standard and at the present  
24 time.

25 Q Isn't it true that they could have changed the

1 forward-looking use of the standard and maintained  
2 backward compatibility if they had wanted to?

3 A And, in fact, they may well do that, because  
4 they've not yet established that "n" will be a standard  
5 with the CSIRO technology in it.

6 Q To date they haven't done that, have they?

7 A No. But I understand that that's one of the  
8 reasons that they're holding up approving the "n"  
9 standard.

10 Q Isn't it true that CSIRO wrote a letter to the  
11 IEEE on the "n" standard saying it would be reasonable  
12 and nondiscriminatory?

13 A But I also understand that the IEEE is  
14 concerned about what their meaning of reasonable and  
15 nondiscriminatory in terms of the RAND standard is, and  
16 therefore, has not approved the new in "n" standard.  
17 But in this case, it really doesn't matter, in my  
18 opinion, because once CSIRO made its commitment, it goes  
19 forward to all future amendments to the -- to the -- to  
20 the "a" 11 standard.

21 Q Why then did the IEEE 802.11 committee send  
22 CSIRO another letter with regard to the "n" standard?

23 A I can't speak for the IEEE, but my guess would  
24 be, if I were asked, is they want to make -- that they  
25 understand that there's this litigation going on, and

1 they want to understand exactly what CSIRO's position is  
2 as they go forward. But, in fact, the belief is that it  
3 is incorporated.

4 Q What is incorporated?

5 A That if the CSIRO -- that their prior  
6 commitment to a reasonable and nondiscriminatory rate,  
7 within the meaning of what the IEEE understands is  
8 reasonable, is incorporated as we move forward to later  
9 versions.

10 Q Are you aware of any of the history of the  
11 negotiations between CSIRO and the defendants in this  
12 case?

13 A I am not.

14 Q Is it reasonable for the industry to decide  
15 that an appropriate royalty is zero on -- without  
16 negotiation?

17 A I don't know whether -- what the -- you ask me  
18 whether they do negotiations. They have not committed  
19 to a RAND zero rate. They committed to just a RAND rate  
20 within the meaning of the IEEE's understanding of what a  
21 RAND rate is for an SSO. So that's where they are.

22 Q And that could be negotiated, could it not?

23 A It certainly could be negotiated.

24 Q Do you know whether that's occurred at all?

25 A I have no idea. That wasn't what I was asked

1 to testify about.

2 Q If you would look at -- I believe Mr. Vasquez  
3 showed you what's been marked as DTX412.

4 And we can go down to the bottom of the page  
5 and establish that these are guidelines that were  
6 promulgated on -- the right-hand corner there.

7 These were promulgated on October 14th of  
8 2008; isn't that right?

9 A That's what it says.

10 Q So this is ten years after the CSIRO letter  
11 was given to the IEEE, right?

12 A Yes.

13 Q And these guidelines were not available at  
14 that time; these are different guidelines than were in  
15 effect in 1998, are they not?

16 A The letter is dated 2008, so I guess that's  
17 what that says.

18 Q Well, is there any indication in the  
19 guidelines that existed at the time that reasonable  
20 meant very, very low or zero?

21 A No. But certainly the committees were given  
22 the opportunity during their discussions to determine  
23 relative costs in determining which technology to  
24 determine is the standard, as I keep testifying to, the  
25 same thing over and over, and that the testimony of



1 people who are on the committee have testified what  
2 their understanding of RAND was in terms of what they  
3 were willing to accept as -- as a reasonable royalty.

4 Q Now, do you know how much Cisco paid for  
5 Radiata?

6 A I don't recollect the exact number.

7 Q Does the number of \$295 million sound correct?

8 A Sounds about right.

9 Q Wouldn't it be reasonable to consider that as  
10 well in evaluating how much Cisco paid for the patent  
11 rights?

12 A Absolutely not. In my experience, when I  
13 worked for IBM and other companies, basically you're  
14 paying for the people; you're not paying for the  
15 specific technologies of the patents related to them.  
16 So my guess is the overwhelming majority of that money  
17 went for acquiring Radiata's people.

18 Q Do you know how long those people remained  
19 with Cisco?

20 A I have not. It doesn't matter really. Once  
21 you get them, you understand what their capabilities  
22 are, and they pass on the knowledge that they've got,  
23 you have you've gotten most of the value from them.  
24 If -- I've bought many companies, and that was always  
25 the case. The value of the patents was always a de

1        minimus value in our calculations.

2            Q        If, in fact -- assume for a moment that --  
3        that within one year all of those people were gone,  
4        wouldn't that suggest that the people were not key to  
5        the situation?

6            A        No. Wouldn't suggest that at all. Other  
7        opportunities arise. They may have been paid out --  
8        been given large payouts. There's a whole bunch of  
9        factors on why people leave. But as long as they hung  
10       around for -- within that year, my guess is they  
11       transferred most of the relevant knowledge to the Cisco  
12       people.

13           Q        And since CSIRO's relevant knowledge had been  
14       transferred to Radiata, that Cisco was acquiring in part  
15       CSIRO's work right?

16           A        Knowledge.

17           Q        Knowledge.

18           A        Experience of the people, what they had  
19       learned and what they were doing, so they could pass it  
20       along to the Cisco people.

21           Q        And that would include things like test  
22       results and modeling and studies and those sorts of  
23       things?

24           A        Whatever was allowed that was considered, you  
25       know, under whatever confidentiality agreements existed.

1           Q     Now, did IBM, when you were there, charge  
2 royalties on finished products?

3           A     It depended on what the patents covered. Most  
4 of the royalties charged, we tried to go to the lowest  
5 level element. So basically we charged on the chip if  
6 we believed the patent covered the chip.

7           Q     My question was, did IBM charge royalties on  
8 finished products?

9           A     Only if we had a patent that covered a system.  
10 And that was all elements of the system were covered by  
11 what was being built by the box manufacturer. So it was  
12 really relevant to how far along the chain the patent  
13 covered.

14          Q     If the patent covered the method that  
15 practiced the invention, it would be appropriate to  
16 charge a royalty on a finished product, would it not?

17          A     It depended, again, on the language of the  
18 patent, and method patents were always problematical, so  
19 we tried not to rely very heavily on method patents.

20          Q     That was IBM's practice.

21          A     That was IBM's practice. You asked me about  
22 it.

23          Q     Yes. But that wasn't the practice of the  
24 entire industry, was it?

25          A     I have no idea of the entire industry. I do

1 know in lots of negotiations that I had with probably  
2 hundreds, if not many more companies, that was generally  
3 the case that both sides agreed to during the  
4 negotiations.

5 Q Isn't it true that IBM charged royalties on  
6 DRAM products when their patents covered only portions  
7 or circuits of in those products?

8 A If the patent covered the DRAM, we only  
9 charged for the circuitry of the DRAM.

10 Q Didn't IBM charge percentages of the sales  
11 price of the DRAM?

12 A Of the DRAM, that's correct. Not of the  
13 product that the DRAM went into.

14 Q But not just on the cost or the value of the  
15 particular circuit?

16 A We had many patents that covered many elements  
17 of the DRAM, so in composite, the number of patents that  
18 we had that covered the majority of the -- of what was  
19 in a DRAM.

20 Q You testified that -- let me put it another  
21 way. Isn't it true that a letter of assurance is -- the  
22 principle behind is that it creates a contract?

23 A I think I testified that there's a letter  
24 sent, and there's reliance on that letter. So I'm not  
25 giving a legal opinion, because I wasn't asked to

1 provide a legal opinion. I would say that a -- a  
2 contract has been formed between the parties in the  
3 sense of the parties putting forth an agreement and the  
4 other party acting in reliance on it.

5 Q And in this case, if you look at the CSIRO  
6 letter, which again is Exhibit 874, it says, in the  
7 second paragraph -- in the second paragraph, it says --  
8 it says, "In the event that a proposed standard is  
9 adopted and the standard cannot be practiced without the  
10 use of the patent referenced above, CSIRO agrees upon  
11 written request to grant a nonexclusive license under  
12 such patent on a nondiscriminatory basis and on  
13 reasonable terms and conditions, including its  
14 then-current royalty rates."

15 Do you see that?

16 A I do.

17 Q Now, do you know, did any of the parties or  
18 defendants in this case make a written request to CSIRO  
19 for a license?

20 A I have no idea whether they did or didn't.

21 Q Well, the company agreement says that upon  
22 written request, CSIRO will do something. That's a  
23 condition precedent, isn't it?

24 A It just says at some point, if the defendant  
25 believes it needs a license, it will make a request. It

1 doesn't say what order or when that written request has  
2 to come.

3 Q Well, it goes on to say, its then current  
4 royalty rates. Doesn't that refer to the time when the  
5 written request is made?

6 A Then current is -- once the rates are  
7 established, those are two separate points. It just  
8 says that it will make a written request, and it says  
9 then current royalty rates. It doesn't talk about what  
10 those royalty rates are. As I said, those royalty  
11 rates, I believe, have already been established.

12 Q Wasn't the Radiata agreement before the date  
13 of this letter?

14 A It is the stepping into of it Cisco and the  
15 following stepping into of it Marvell. To me, the  
16 written request thing is something that whenever it's  
17 made, it's made, and it doesn't really -- the material  
18 thing is which -- in my experience, whether we went to a  
19 company and told them they had to take a license or they  
20 wrote us a letter with regard to a standard, it didn't  
21 really make a difference. That was just the language in  
22 there. To my experience, it was never an important  
23 element of the determination.

24 Q Well, doesn't the term "written request" and  
25 "then-current royalty rates," they're in the same

1 sentence, they mean the same thing -- the same event,  
2 don't they? Doesn't it mean when you request a license,  
3 we'll give you our then-current royalty rates?

4 A That's what it says. As I said, to me the  
5 written request thing was not the important thing. If  
6 CSIRO came first and -- and asked them to take a  
7 license, it was then current royalty rates, they were  
8 similarly bound by it.

9 Q In that situation --

10 A That's based on my experience.

11 Q In that situation, is there an obligation --  
12 isn't there an obligation on the part of the other party  
13 to attempt to negotiate a reasonable royalty?

14 A If they believe they have a need for a patent.

15 Q Well, if you don't have a need for a patent,  
16 then you don't need the RAND letter; is that right?

17 A If you don't have a need for the patent, then  
18 that's maybe why they haven't sent letters yet.

19 Q And that's the position that the defendants  
20 are taking here, that they don't need a license for the  
21 patent because it's invalid, right?

22 A That's my understanding.

23 Q Now, you asked about royalty -- or you  
24 testified about royalty stacking.

25 Do you see that -- or do you remember that?

1           A     I do.

2           Q     Do you know whether any of the defendants are  
3     paying any royalties on any of their 802.11 products?

4           A     I do not.

5           Q     And so your concern about royalty stacking at  
6     this point, at least, is theoretical, isn't it?

7           A     Except as I think I mentioned, Netgear, I  
8     understand, has been sued on multiple patents related to  
9     the standard.

10          Q     That doesn't mean they're going to have to pay  
11     any royalties, though, does it?

12          A     Not unless the Court determines whether or not  
13     there's a problem.

14          Q     Now, you testified that you think that the  
15     royalty rate of five cents would be at the high range of  
16     the royalty?

17          A     Based on my experience, that would be at the  
18     high end of the range.

19          Q     Do you know what five cents would be as a  
20     percentage of the finished product that including WiFi,  
21     or the 802.11g functionality?

22          A     I think it was testified that the product was  
23     going to be in the five to ten dollar range.

24          Q     I'm not talking about the chip. I'm talking  
25     about the finished product, such as an access point.



1           A     I do not.

2           Q     The patent law allows a patentholder to seek a  
3 royalty base at any point in the chain, does it not?

4           A     Patent law does, but we're talking about what  
5 the commitment was with regard to the standard.

6           Q     And the commitment that CSIRO makes said  
7 nothing about that it would charge a royalty on a chip  
8 price, did it?

9           A     No, but it talked about extend current rates  
10 which was the rates that they had put forth in the  
11 Radiata license agreement which they then passed on to  
12 Cisco and onto Marvell and others.

13          Q     In the Marvell license, is there a royalty  
14 rate stated?

15          A     I don't know if there's a royalty rate stated,  
16 but I do know that Cisco asked for and obtained an  
17 agreement from CSIRO that Marvell could build those  
18 chips under the rates that Cisco was paying.

19          Q     Do you know whether that agreement with  
20 Marvell was that they could or could not sell it to the  
21 outside world, other than selling it to Radiata?

22          A     I believe it limited them to selling it to  
23 Cisco.

24          Q     They were limited to selling it to Radiata?

25          A     Which was part of Cisco.

1           Q     Isn't it true that Cisco never exercised the  
2     option to use the license for its Linksys subsidiary but  
3     instead with Atheros chips?

4           A     I have no idea whether they did or didn't.

5           Q     Well, assume that Mr. Rossi testified about  
6     that yesterday, in that case, if only a small percentage  
7     of Cisco's production were licensed under the agreement,  
8     there would not be any unlawful discrimination or any  
9     improper discrimination; isn't that true?

10          A     As I said, I have no idea whether the patent  
11     covers the Linksys products or whatever. That was  
12     outside of what I was asked to testify about, so I have  
13     no knowledge of that.

14          Q     Well, it's relevant to the issue of the  
15     technology license, isn't it?

16          A     It's relevant only if in fact the technology  
17     is covered -- the patent is covered in the technology,  
18     and I have no knowledge of that. I wasn't asked to  
19     opine about that.

20          Q     Have you ever attended any RAND committee  
21     meeting?

22          A     No, but my people did and many people at IBM  
23     who reported to me did and reported to me back about  
24     what they had learned there.

25                     MR. FURNISS: I'll pass the witness, Your

1 Honor.

2 THE COURT: All right. Redirect?

3 MR. VASQUEZ: Briefly, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. VASQUEZ

6 Q Mr. Rosenthal, is it discriminatory to agree  
7 to license to one chip vendor for five cents and not  
8 agree to license to the five-cent percipient  
9 competitors?

10 A I believe that's discriminatory based on my  
11 experience and what would promote fair competition in  
12 the industry.

13 Q If CSIRO refused to license to all of  
14 Radiata's chip competitors, the main suppliers to the  
15 defendants in this case at all, would that be  
16 discriminatory?

17 A Absolutely.

18 Q Okay. If CSIRO uses the excuse that it wanted  
19 to get a higher royalty by licensing for -- at the  
20 box-maker level, would that be an excuse for this  
21 discrimination?

22 A I believe it would.

23 Q It would not?

24 A I believe it would be discriminatory.

25 Q Right.

1                   Is it discriminatory for CSIRO to refuse to  
2                   give Cisco's router competitors to people like Netgear  
3                   and Belkin and Accton and 3Com, is it discriminatory to  
4                   refuse to give them the five-cent rate that Cisco was  
5                   paying and CSIRO has accepted?

6                   A       I believe it would be discriminatory.

7                   THE COURT: Mr. Vasquez, what was the  
8                   date of the Cisco license agreement?

9                   MR. VASQUEZ: I was just about to ask him  
10                  some questions on that. If you listen, I think it will  
11                  be in context for you.

12                 Q       (By Mr. Vasquez) What was the rate given to Radiata  
13                  -- the Radiata license came in in what year, sir?

14                 A       I believe it was --

15                 Q       '98, right?

16                 A       Right.

17                 Q       What was the rate there for more than  
18                  3 million?

19                 A       I believe it was a half a percent.

20                 Q       A half a percent.

21                 What was the rate at 2001 when the Cisco  
22                  extension was granted by CSIRO?

23                 A       I believe that Cisco just stepped into that  
24                  agreement, so the rate would be the same.

25                 Q       What was the rate in 2003 when CSIRO agreed to

1 extend the rate to Cisco's suppliers, the chip  
2 companies, and then the router maker, SkyPilot, and  
3 television maker, Sharp?

4 A My answer would be the same, that they just  
5 kept stepping into the agreement with no change in the  
6 agreement, so it would still be the half percent.

7 Q So it was the then current rate offered by  
8 CSIRO any different in 1998, 2001 or 2003?

9 A I believe it was the same.

10 MR. VASQUEZ: Your Honor, does that  
11 address the issue?

12 THE COURT: Yes.

13 MR. VASQUEZ: Thank you.

14 Q (By Mr. Vasquez) Do licenses get taken by IBM when  
15 IBM has validity and infringement concerns, in other  
16 words, do they license anyone?

17 A Take a license or give a license?

18 Q Do they take a license?

19 A No. When somebody brought a patent to IBM, we  
20 would study the patent. If we determined that the  
21 patent was either invalid or not infringed, we would not  
22 take a license, we would give arguments back on why it  
23 was not valid and noninfringed and hopefully the  
24 discussions would move on from there.

25 Q Based on your experience in the industry and

1 custom, does the RAND commitment evaporate because a  
2 discussion ensues between the prospective licensee and  
3 the licensor about the validity of the patent or whether  
4 the patent infringes?

5 A No. I mean, RAND is a separate element. Once  
6 you determine you have a need for the patent, then  
7 you're expected to be able to take a license to it under  
8 RAND rates.

9 Q And it doesn't forfeit because you contest the  
10 patent?

11 A Not in my experience.

12 Q Okay. Now, Mr. Furniss told you that Cisco  
13 paid \$300 million for Radiata and you said that didn't  
14 affect your opinion. Would it assist you in resolving  
15 that question if you knew that CSIRO obtained a report  
16 from a Big four accounting firm, PWC, that said the  
17 total value of the patent, assuming that the A standard  
18 was ratified, if that report said that the value of the  
19 patent was between \$5 million, would that have any  
20 impact on your opinion about these rates?

21 A No. As I mentioned earlier to Mr. Furniss, I  
22 think that when you buy a company, at least in my  
23 experience, and we bought many companies at IBM, we were  
24 buying the people and what was in their heads more than  
25 what we were buying what was on paper. That we knew

1 about already, it was what was in their heads that we  
2 were interested in, and we were able to transfer that  
3 knowledge in a relatively short period of time.

4 Q Would it be consistent with your experience if  
5 you saw evidence that Cisco's auditing team had assigned  
6 value of 5 million to all intellectual property as  
7 amongst the 300 million?

8 A It would just substantiate what I said was  
9 that basically they were buying the people.

10 Q Now, you were asked about a 2008 policy versus  
11 the policy in the '90s. Does the 2008 policy that you  
12 testified about here today, is it any different on the  
13 important topics of discrimination and reasonableness  
14 than you recall in the '90s?

15 A No, I believe it was pretty much the same.

16 Q You were asked how CSIRO should know about the  
17 reasonable understanding that you testified here to  
18 today. Were you aware that the licensor, Radiata, that  
19 its president who negotiated that license with CSIRO's  
20 licensing people was an IEEE member?

21 A I was not aware of that.

22 Q Assuming that he was an IEEE member and that  
23 they had discussions, would you want to know if CSIRO  
24 actually knew about the IEEE policy that reasonable  
25 meant low?

1           A     It would certainly be helpful. But as I said,  
2     CSIRO, they were part of the Australian government,  
3     there were lawyers there who -- in my experience, this  
4     is not a small operation without the ability to get  
5     opinions of their own lawyers to determine what RAND  
6     meant before you write a letter that committed to  
7     something.

8           Q     Now, does the definition of what a reasonable  
9     royalty is, is it different when you're not locked into  
10    a standard and you have to compete on the merits of your  
11    technology versus when you are locked into a standard  
12    and everyone is mandated to follow your patent?

13          A     Sure.

14          Q     How does that happen?

15          A     Well, clearly, I mean, if the patent you have  
16    is not related to a standard, then -- you know, then  
17    it's between you and the other party because there's no  
18    indication that other than the company you're dealing  
19    with is going to actually be selling product.

20                In this case once there was a standard,  
21    there's going to be many companies selling the product  
22    and there's going to be billions of products built, and  
23    so there was a huge difference here.

24          Q     Now, you testified that you dealt with a lot  
25    of standards organizations besides the IEEE. In your



1 experience, was it the norm to get a special letter that  
2 says we've received your RAND letter, what's your price,  
3 did that letter come out?

4 A No, they all were pretty much similar to the  
5 IEEE.

6 Q The last thing I wanted to go into is the  
7 simple concept of custom and practice. In your  
8 deposition you were asked about practice and you said  
9 each company had its own practice; is that correct?

10 A That's correct.

11 Q And you testified here today that you're  
12 familiar with many companies' practices from your  
13 benchmarking experience and from your participation; is  
14 that correct?

15 A That's correct.

16 Q From that experience, were you able to discern  
17 a custom where if you look at the blended norms?

18 A Well, as I said, you know, many, many  
19 companies charge zero, many companies didn't even get  
20 involved, they just said my patents will be there and  
21 never even followed up with it. And then some companies  
22 like we did, we basically charged the cost of writing up  
23 an agreement and submitting it, and somewhere between 5  
24 and \$20,000 depending on the agreement. So it was  
25 always in that way.

1 Q And so your testimony here today is based upon  
2 your observation of the totality of the custom that  
3 emerged from viewing all these practices and  
4 participating, correct?

5 A From what I saw both within my company and  
6 other companies that I talked with.

7 MR. VASQUEZ: No further questions.  
8 Thank you.

9 THE COURT: Any recross?

10 MR. FURNISS: Just a little bit, Your  
11 Honor. Pull up Plaintiff's Exhibit 1022 to page 3634.

12 RECROSS-EXAMINATION

13 BY MR. FURNISS

14 Q I had asked you before about the Marvell  
15 license. And do you see there that it called for a ten  
16 percent royalty on the -- strike that.

17 It called for a ten percent royalty on net  
18 revenue derived from the sale?

19 A Revenue from Marvell to Cisco, that has  
20 nothing to do, in my opinion, with what the Cisco  
21 agreement and what was extended by CSIRO to Marvell had  
22 to do. This is just an internal royalties between  
23 Marvell and Cisco, as I see it. I'm just looking at  
24 this exhibit. I have no idea what the total agreement  
25 is even about.

1           Q     Wouldn't that indicate a value at the time,  
2     however, of the hypothetical negotiation?

3           A     No, I have no idea what the business  
4     relationship between Marvell and Cisco that talked about  
5     this was and what it was in relation to.

6           Q     Are you aware that the Marvell license was  
7     subsequently altered to provide that Marvell could not  
8     sell to third parties?

9           A     I have no idea. I have not seen that  
10    agreement.

11          Q     Well, you rely upon the Marvell license.

12          A     I just relied upon the fact that Cisco asked  
13    to be extended to Marvell and it was allowed to be  
14    extended to Marvell.

15          Q     You didn't look at the modification of that  
16    license?

17          A     I don't remember whether I have or not.

18          Q     Are you aware that CSIRO contends that that  
19    license -- well, strike that.

20                Are you aware that Cisco needed CSIRO's  
21    consent for the Marvell license and didn't get it?

22          A     I believe I thought -- my understanding was  
23    that they had that agreement, that they could extend it  
24    to their suppliers and that Marvell was one of them.

25          Q     Let's look at Plaintiff's Exhibit Number 2070,

1 slide 6.

2 And it says there at the top, "Inappropriate  
3 Topics for IEEE WG Meetings."

4 WG is working group, right?

5 A Uh-huh.

6 Q And the first one says "don't discuss  
7 licensing terms or conditions." Isn't that true?

8 A That's what it says.

9 Q So it would have been inappropriate for the  
10 members of the IEEE to collectively consider what the  
11 royalty rates were for any particular patent?

12 A As I said, they were able to discuss costs,  
13 which they did, and which was testified to by members of  
14 the committee and how that cost would effect the  
15 ultimate price of the product in terms of competing  
16 standards that they were looking at incorporating. And  
17 my understanding is that that's certainly allowed to be  
18 done in determining what to establish as a standard.

19 Q Well, again, I ask you again, isn't it true  
20 that with regard to IP rights, cost and price are  
21 exactly the same thing?

22 A No. The cost are all the elements that go  
23 into building the product, not what the price of the  
24 product sold is.

25 Q So if you're talking about just intellectual

1 property rights, just intellectual property rights, do  
2 you have to ask that cost?

3 A That's what cost is. Isn't doesn't -- that  
4 cost then gets multiplied many times once it's built  
5 into the product as it goes down the channel, so what  
6 the ultimate pricing, the selling price of the product  
7 is which is affected by a penny or two pennies cost  
8 could end up being a dollar or more.

9 So no, so there's big differences here.

10 Q And that's your opinion based on IBM?

11 A That's my opinion based on IBM and discussions  
12 with other companies.

13 Q And was there a universal agreement on that?

14 A I have no idea what universal agreement is, I  
15 only have the knowledge of the universe that I dealt  
16 with which was many companies.

17 Q Thank you.

18 MR. FURNISS: I'll pass the witness.

19 MR. VASQUEZ: No further questions, Your  
20 Honor.

21 THE COURT: All right. Very well. May  
22 this witness be excused?

23 MR. VASQUEZ: Yes.

24 MR. FURNISS: Yes.

25 THE COURT: Very well.

1 And Mr. Furniss, did you intend to offer  
2 any exhibits with regard to this witness?

3 MR. VASQUEZ: Yes, Your Honor.

4 THE COURT: What exhibits are those?

5 MR. FURNISS: 2794, 2069, 3387.

6 Defendants' 412 is already in. Plaintiff's 1022 and  
7 2070.

8 THE COURT: Okay. Any objection?

9 MR. VASQUEZ: Just to the from internet  
10 posting, Your Honor.

11 THE COURT: Just to what?

12 MR. VASQUEZ: The one document -- 3387 is  
13 the unattributed without foundation e-mail.

14 THE COURT: You noted your objection to  
15 that and I've ruled on that.

16 MR. VASQUEZ: Right. That was the only  
17 one.

18 THE COURT: Your objection is noted. No  
19 other objections?

20 MR. VASQUEZ: No other.

21 THE COURT: All right. Those will be  
22 admitted.

23 Anything further?

24 MR. FURNISS: No, Your Honor.

25 THE COURT: Okay. Anything further from

1 either party before we recess until Monday?

2 MR. MIKE JONES: Your Honor, could we get  
3 a time total?

4 THE COURT: Yes. Plaintiff has used ten  
5 hours and 55 minutes, defendant has used eleven hours  
6 and 45 minutes, according to the Court's clock.

7 MR. MIKE JONES: Thank you, Your Honor.

8 THE COURT: All right. We'll be in  
9 recess.

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## REPORTER'S CERTIFICATE

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Tyler, Texas, this the 17th day of April, 2009.

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D. KEITH JOHNSON, RDR, CRR

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KIMBERLY J. JULIAN, RPR, CRR